



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 3, 2004

Mr. Jeffrey S. Young
Associate General Counsel
Texas Tech University System
Suite 2B141
3601 4th Street STOP 6246
Lubbock, Texas 79430-6246

OR2004-1610

Dear Mr. Young:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196360.

The Texas Tech University Health Sciences Center (the "center") received a request for information relating to grants and donations made to the center for the past three years. You claim that release of the marked portions of the submitted information may implicate the proprietary interests of third parties under sections 552.101 and 552.110 of the Government Code, although you take no position as to whether the information is so excepted. You state, and provide documentation showing, that you notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We note that Abbott Laboratories, Inc. ("Abbott") has agreed to release its information. Therefore, we will not address information relating to Abbott in this ruling and assume you have released information related to this company. If you have not released such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302. Five of the third parties have submitted arguments against the disclosure of their proprietary information to this office. We have reviewed these arguments and the submitted information.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, six of the third parties have not submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. Therefore, these companies have provided us with no basis to conclude that they have protected proprietary interests in any of the submitted information. *See* Gov't Code § 551.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, the submitted information related to these companies must be released.

Two of the third parties who submitted comments to this office argue that the submitted information is confidential under sections 312.130 and 314.430 of title 21 of the Code of Federal Regulations. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Sections 312.130 and 314.430 pertain to the public disclosure of information found in investigational new drug applications filed with the Food and Drug Administration (the "FDA"). 21 C.F.R. §§ 312.130, 314.430 (2004). We note that sections 312.130 and 314.430 specifically regulate the public disclosure of information by the FDA. Accordingly, we conclude that sections 312.130 and 314.430 are not applicable to the present request.

Five of the third parties who submitted comments to this office seek to withhold information under section 552.110 of the Government Code.¹ Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is

¹ We note that three of the third parties argue that the information at issue is not responsive to the present request. However, as the center has submitted the information at issue as responsive to the request, we will consider the public availability of the submitted information.

not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial

competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review, we find that the one of the third parties has made a *prima facie* case that some of the information it seeks to withhold is protected under section 552.110(a) as trade secret information. Moreover, we have received no arguments that would rebut this case as a matter of law. We therefore conclude that the center must withhold the information relating to this company that we have marked pursuant to section 552.110(a). We find, however, that this company has not shown that any of the remaining information it seeks to withhold meets the definition of a trade secret or that its release would cause the company substantial competitive harm. Therefore, the remaining information may not be withheld pursuant to section 552.110.

We find that four of the third parties have made specific factual or evidentiary showings that the release of some of the information they seek to withhold would cause the companies substantial competitive harm. This information, which we have marked, must be withheld pursuant to section 552.110(b). We find, however, that these companies have not shown that any of the remaining information they seek to withhold meets the definition of a trade secret or that its release would cause the companies substantial competitive harm. Therefore, the remaining information may not be withheld pursuant to section 552.110.

We note that some of the remaining information is subject to section 552.1235 of the Government Code. Section 552.1235(a) excepts “the name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]” However, this section does not except from disclosure the amount or value of an individual gift, grant, or donation. *See* Gov’t Code § 552.1235(b). “Institution of higher education” is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 of the Education Code defines an “institution of higher education” as any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section. Upon review, we find that the center qualifies as an “institution of higher education” under section 61.003 of the Education Code. Because section 552.1235 of the Government Code does not provide a definition of “person,” we look to the definition provided in the Code Construction Act. *See* Gov’t Code § 311.005. “Person” includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. Gov’t Code § 311.005(2). Therefore, the names of the third parties who made a gift, grant or donation of money or property to the center are excepted from disclosure. We note, however, that Abbott and GlaxoSmithKline affirmatively state that they agree to

the release of their names in regard to the present request. Therefore, we find that the center may not withhold the names of these companies under section 552.1235. The center must withhold the names of the remaining companies, which we have marked, pursuant to section 552.1235.

In summary, the center must withhold the portions of the submitted information we have marked under sections 552.110 and 552.1235 of the Government Code. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 196360

Enc. Submitted documents

c: Mr. Mark Horvit
Fort Worth Star-Telegram
400 West Seventh Street
Fort Worth, Texas 76102
(w/o enclosures)

Mr. William L. Christopher
Senior Counsel, R&D Legal Operations
GlaxoSmithKline
P.O. Box 13398
Research Triangle Park, North Carolina 27709
(w/o enclosures)

Ms. Elizabeth J. Costello
Abbott Laboratories
200 Abbott Park Road, R442-LFCP4-4N
Abbott Park, Illinois 60064-6229
(w/o enclosures)